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Nos. 81-2245, 81-2270 and 82-[illegible]

In The

Supreme Court of the United States

October Term, 1982

STATE OF NEVADA,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CROSS-PETITIONER PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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QUESTIONS PRESENTED

Whether the res judicata effect of the 1944 decree in a suit quieting title to Truckee River water rights in Nevada bars the Pyramid Lake Paiute Tribe of Indians from asserting its reserved right to Truckee River water for fishery purposes even though in the prior suit:

(a) The Tribe was not a party;

(b) The United States purported to represent the interests of the Pyramid Lake Reservation and the Reclamation Project and the assertion of the water right for fishery purposes would have conflicted with the water rights sought for the Newlands Project;

(c) The Tribe's water right for fishery purposes was not asserted or litigated;

(d) The government's attorneys did not believe that the Tribe's water right for fishery purposes was in issue; and

(e) The water right for fishery purposes requires proof of different facts than the Tribe's agricultural water right that was litigated.

LIST OF PARTIES

The United States was plaintiff-appellant below. The Pyramid Lake Paiute Tribe of Indians was plaintiff-intervenor-appellant. Defendants-appellees were the Truckee-Carson Irrigation District, the State of Nevada, the Sierra Pacific Power Company, the Cities of Reno and Sparks, Washoe County, and approximately 17,000 individually named persons, firms, partnerships, and corporations who have, or claim, rights to use the waters of the Truckee River or its tributaries in the State of Nevada. The Truckee-Carson Irrigation District appeared in its own right and, with others, as class representatives of approximately 4,000 water users in the Newlands Reclamation Project. *See United States v. Truckee-Carson Irrigation District*, 71 FRD 10 (D. Nev. 1975), JA 191-205.

Nevada has filed with the Clerk of the Court a list of the approximately 17,000 defendants in this case. Nev. Pet. No. 81-2245 at ii n*.

TABLE OF CONTENTS

	Pages
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provision	2
Statement	2
Pyramid Lake	2
The Pyramid Lake Indian Reservation	5
The Newlands Reclamation Project	6
The *Orr Ditch* Proceedings	7
Post-*Orr Ditch* Legal Proceedings	10
Proceedings Below	12
Summary of Argument	15
I. The fishery water right is not part of the *Orr Ditch* cause of action.	18
A. General Principles	18
B. The Tribe's Cause of Action is Necessarily Different	20
C. Same Evidence Test	22
D. Pragmatic Considerations	25

TABLE OF CONTENTS—Continued

Pages

II. Barring the tribe from asserting its claimed fish. . water right results in a denial of procedural due process. 37

III. NON-*Orr Ditch* parties cannot take advantage of res judicata. 43

Conclusion 44

Appendix ..... App. 1

TABLE OF AUTHORITIES

CASES:

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 6, 23, 34

Arizona v. California, 373 U.S. 546, 598-601 (1963), 376 U.S. 340, 344-45 (1964) 23

Barry v. Barchi, 443 U.S. 55 (1979) 38

Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., 19 Cal. 2d 807, 122 P. 2d 892 (1942) 34

Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971) 18, 25

Brown v. Felsen, 442 U.S. 127 (1970) 19, 26

California v. United States, 438 U.S. 645 (1978) 13

Cappaert v. United States, 426 U.S. 128 (1976) 2, 23

Carson-Truckee Water Conservancy District v. Watt, 537 F. Supp. 106, 549 F. Supp. 704 (D. Nev. 1982) 4, 5, 23

Chicago R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611 (1926) 33

TABLE OF AUTHORITIES—Continued

Pages

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) ——— 27

Colville Confederated Tribes v. Walton, 647 F. 2d 42 (9th Cir. 1981), *cert. denied*, 454 U. S. 1092 ——— 24

Cuyler v. Sullivan, 446 U. S. 335 (1980) ——— 40, 41

Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93 (S. D. N. Y. 1972) ——— 28

Expert Electric, Inc. v. Levine, 554 F. 2d 1227 (2d Cir. 1977), *cert. denied*, 434 U. S. 903 ——— 19

Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380 (1947) ——— 34

Flagg Brothers, Inc. v. Brooks, 436 U. S. 149, 156-57 (1978) ——— 42

Flast v. Cohen, 392 U. S. 83 (1968) ——— 29

Glasser v. United States, 315 U. S. 60 (1942) ——— 39, 40

Goldberg v. Kelly, 397 U. S. 254 (1970) ——— 39

Hansberry v. Lee, 311 U. S. 32 (1940) ——— 27, 39, 40, 42

Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd.*, 373 U. S. 758 ——— 30

Hatchitt v. United States, 158 F. 2d 754 (9th Cir. 1946) ——— 36

Holloway v. Arkansas, 435 U. S. 475 (1978) ——— 39

Horse Creek Coal Land Co. v. Alderson, 266 F. 477 (4th Cir. 1920) ——— 36

Iselin v. Meng, 307 F. 2d 455 (5th Cir. 1962), *cert. denied*, 372 U. S. 909 ——— 36

TABLE OF AUTHORITIES—Continued

Pages

Kremer Chemical Construction Co., 102 S. Ct. 1883 (1982) 18, 38

Landon v. Plasencia, — U. S. —, 51 U. S. L. W. 4001 (No. 81-129, November 15, 1982) 38

Lawlor v. National Screen Service Corp., 349 U. S. 322 (1955) 20

Lane v. Pueblo of Santa Rosa, 249 U. S. 110 (1919) 21

Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982) 40, 41, 42, 43

Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585 (1935) 23

Lugar v. Edmundson Oil Co., 102 S. Ct. 2744 (1982) 40, 42

Lynch v. Kemp, 4 Cal. 2d 440, 49 P. 2d 817 (1935) 36

Manygoats v. Kleppe, 558 F. 2d 556 (10th Cir. 1977) 27

Masterson v. Pacific Livestock Co., 144 Or. 396, 24 P. 2d 1046 (1933) 24

Menominee Tribe v. United States, 391 U. S. 404 (1968) 6, 23

Montana v. United States, 440 U. S. 147 (1979) 20, 43

Morrisey v. Brewer, 408 U. S. 471 (1974) 39

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 27, 38, 39

Muskrat v. United States, 219 U. S. 346 (1911) 29, 30

New Jersey v. New York, 345 U. S. 369 (1953) 39

TABLE OF AUTHORITIES—Continued

Pages

New Mexico v. Aamodt, 537 F. 2d 1102 (10th Cir. 1976), *cert. denied*, 429 U. S. 1121 ..... 27, 30

Oneida Indian Tribe v. County of Oneida, 414 U. S. 661 (1974) 21

Parklane Hosiery Co. v. Shore, 439 U. S. 322 (1979) 19

Poafpybitty v. Skelly Oil Company, 390 U. S. 365 (1968) 21

Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 360 F. Supp. 669 (D. D. C. 1973) *reversed*, 499 F. 2d 1095, *cert. denied*, 420 U. S. 962 ..... 4, 5, 11

Reno Club v. Harrah, 70 Nev. 125, 260 P. 2d 304 (1953) 20, 22

Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F. 2d 1082 (9th Cir. 1972) 27

Sea-Land Services v. Gaudet, 414 U. S. 573 (1974) 19, 20, 26

Schroeder v. City of New York, 371 U. S. 208 (1962) 39

Schweiker v. Hansen, 450 U. S. 285 (1981) 34

Seufert Bros. Co. v. United States, 249 U. S. 194 (1919) 34

Simon v. Eastern Kentucky Welfare Rights Commission, 426 U. S. 26 (1976) 29

Smith v. Ayer, 101 U. S. 320 (1880) 34

Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919) 20, 25

TABLE OF AUTHORITIES—Continued

Pages

TCID v. Secretary of the Interior, Civ. No. R-74-34 BRT (D. Nev.) 12

Trbovich v. United Mine Workers, 404 U. S. 528 (1972) 21

Union Pacific Co. v. Laramie Stock Yards Co., 231 U. S. 190 (1913) 25

Union Mill & Mining Co. v. Dangberg, 81 F. 73 D. Nev. 1897) 24

United States v. Alpine Land & Reservoir Co., 431 F. 2d 763, 765 (9th Cir. 1970), *cert. denied*, 401 U. S. 912 4

United States v. California & Oregon Land Co., 192 U. S. 355 (1904) 23, 33, 36

United States v. The Haytian Republic, 154 U. S. 118 (1894) 20, 22

United States v. I. C. C., 337 U. S. 426 (1949) 28, 29

United States v. Jensen, 608 F. 2d 1349, 1355 (10th Cir. 1979) 33

United States v. Johnson, 319 U. S. 302 (1943) 28, 30

United States v. Nixon, 418 U. S. 683 (1974) 28, 29

United States v. Orr Water Ditch Company, Equity No. A-3 (D. Nev.) ..... passim

United States v. Security Industrial Bank, — U. S. —, 51 U. S. L. W. 4007 (No. 81-184, Nov. 30, 1982) 20, 25

United States v. Southern Pacific Transportation Co., 543 F. 2d 676 (9th Cir. 1976) 28

TABLE OF AUTHORITIES—Continued

Pages

United States v. Winans, 198 U. S. 371 (1905) 34

United States v. Sturgeon, 27 Fed. Cas. 1357 (D. Nev. 1879) *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879) 2, 6, 34

United States v. Walker River Irrig. Dist., 104 F. 2d 334 (1939) 6

United States v. State of Nevada, 412 U. S. 534 (1973) 4, 12

Von Moltke v. Gillies, 332 U. S. 708 (1948) 39

Werlein v. City of New Orleans, 177 U. S. 390 (1900) 34

Wilson v. Omaha Indian Tribe, 442 U. S. 653 (1979) 27, 34

Winters v. United States, 207 U. S. 564 (1908) 2, 34

Wolff v. McDonnell, 418 U. S. 539 (1974) 39

Wood v. Georgia, 450 U. S. 261 (1981) 39, 40, 41

World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286 (1980) 36

CONSTITUTION, STATUTES AND REGULATIONS:

Fifth Amendment, United States Constitution 18, 38, 39, 40, 42

Fourteenth Amendment, United States Constitution 18, 38, 39, 40, 42

16 U. S. C. § 1531 *et seq.* 4

TABLE OF AUTHORITIES—Continued

Pages

25 U. S. C. § 175 34

28 U. S. C. § 1254 (1) 1

28 U. S. C. § 1292 (b) 1

28 U. S. C. § 1345 12

43 U. S. C. § 371 *et seq.* 6, 13, 40

43 U. S. C. § 372 13

43 U. S. C. § 614 (c) (1956) 5

32 Stat. 388 6

43 C. F. R. § 418 ..... 10, 11

50 C. F. R. § 17.11 (1981) 4

TREATIES AND OTHER AUTHORITIES:

Bogert, *Trusts and Trustees* (2d rev. ed. 1980-82) 21, 27

Cohen, F., *Handbook of Federal Indian Law* (1982) 24

2 *Freeman of Judgments* (5th ed. 1925) 35

Kinney, C. S., *Irrigation and Water Rights* (2d ed. 1912) 24

1B *Moore's Federal Practice* (2d ed. 1982) 19, 20, 32, 33

Restatement of Judgments (1942)

§ 61 22

§ 80 32

§ 80, comments b, f 33

TABLE OF AUTHORITIES—Continued

Pages

Restatement (Second) of Judgments (1982)

§ 24 ..... 25, 26

§ 24, comment b 19

§ 26 (1) (d) 30

§ 26 (1) (f) 30

§ 36 ..... 32, 33

§ 36, comment a 32, 33

§ 36, Reporter's Note 32, 42

§ 42 (d) 42

§ 42 (e) 42

§ 42, comment f 42

Restatement (Second) of Trusts 27

Stone, "Are There Any Adjudicated Streams in Montana?", 19 Mont. L. Rev. 19 (1957) 35

2 *Irrigation and Water Rights, supra,* § 1563 at 2829-31 24

2 *Water Rights in the Western States, supra,* § 1233 at 1137 24

6 *Waters and Water Rights,* (R. Clark ed. 1972) 35

Weil, S. C., *Water Rights in the Western States* (3d ed. 1911) 24

S. Wheeler, *The Desert Lake* (1967) 3, 4

OPINIONS BELOW

The opinion of the court of appeals (PA 197a-253a),[1] as amended by its order of July 10, 1982 (PA 254a-255a) is reported at 649 F. 2d 1286. A further order (PA 256a-259a) amending the opinion of the court of appeals, issued on January 5, 1982, is reported at 666 F. 2d 351. The Opinion (PA 161a-179a), Findings of Fact and Conclusions of Law (PA 180a-192a), Certificate under Rule 54 (b) Fed. R. Civ. P. and 28 U. S. C. § 1292 (b) and Stay of Further Proceedings (PA 193a-194a and Judgment PA 193a-196a), issued by the district court on December 12, 1977, are unreported. A prior opinion of the district court, rendered on February 5, 1975, is reported at 71 FRD 10, JA 191-205.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1981. Petitions for rehearing were denied on March 11, 1982. PA 260a-261a. Separate petitions for writs of certiorari were filed by the State of Nevada (No. 81-2245) and by the Truckee-Carson Irrigation District (No. 81-2276) on June 7 and 9, 1982 respectively. The Pyramid Lake Paiute Tribe of Indians, respondent in Nos. 81-2245 and 81-2276, filed a conditional cross-petition for a writ of certiorari (No. 82-38) on July 9, 1982. The two petitions and the cross-petition were granted on October 12, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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[1] "PA" refers to the Appendix to Nevada's Petition for a Writ of Certiorari, No. 81-2245.

CONSTITUTIONAL PROVISION

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT

This suit was brought by the United States and the Pyramid Lake Paiute Tribe to quiet title to the water necessary to preserve and maintain the Pyramid Lake and Truckee River fisheries. Pyramid Lake is a magnificent and unique desert lake, the centerpiece of the Tribe's reservation. Since time immemorial, the Pyramid Lake fishery has been the chief sustenance of the Pyramid Lake Indians. The case concerns the preservation of Pyramid Lake, its fishery, and ultimately, the Pyramid Lake Paiute Tribe.

The water is sought for two related uses: for flows in the Truckee River in sufficient amounts to permit natural reproduction of the Lake's two principle indigenous fish, the Lahontan cutthroat trout and cui-ui, and for sufficient, long term flows into Pyramid Lake to maintain the level of the Lake and the quality of its water. The Tribe and the United States contend that water for this fishery purpose was reserved when the Pyramid Lake Indian Reservation was set aside in 1859. *See Winters v. United States*, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. Sturgeon*, 27 Fed. Cas. 1357 (D. Nev. 1879), *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879).

Pyramid Lake

Pyramid Lake is "widely considered the most beautiful desert lake in North America [and its] fishery . . . brought it world-wide fame. A species of cutthroat trout

. . . grew to world record size [41 pounds] in the desert lake and attracted anglers from throughout the world [including President Herbert Hoover, Justice Harlan Fiske Stone, and Clark Gable]." S. Wheeler, *The Desert Lake* 90-92, 100, 101, 102 (1967).

The first non-Indians to see Pyramid Lake were Captain John C. Fremont and his party in January 1844. In his journal, Fremont, who camped with the Pyramid Lake Indians, reported that the lake broke "upon our eyes like the ocean" and was "set like a gem in the mountains." He described the friendly Indians' incomparable fishery:

> An Indian brought in a large fish to trade which we had the inexpressible satisfaction to find was a salmon trout; we gathered round him eagerly. The Indians were amused with our delight and immediately brought in numbers; so that the camp was soon stocked. Their flavor was excellent—superior, in fact, to that of any fish I have ever known. They were of extraordinary size—about as large as the Columbia river salmon—generally from two to four feet in length. . . . They doubtless formed the subsistence of these people, who hold the fishery in exclusive possession. . . .

The Expedition of John Charles Fremont 609 (1970); PA 199a. The Lake's other principal fish, the cui-ui, were also a staple in the Indians' diet.

Pyramid Lake, approximately the same size as its sister, Lake Tahoe, is the downstream terminus of the Truckee River, an interstate stream.

> The Truckee rises in the High Sierra, flows into Lake Tahoe, through which the California-Nevada boundary runs, exits on the California side of the Lake, and flows 20 miles before crossing into Nevada. It then continues another 65 miles, through Reno and beyond, to its termination in Pyramid Lake, a desert lake 20 miles long and five miles wide, with no out-

let and a water level determined by the balance or imbalance between inflow and evaporation.

United States v. State of Nevada, 412 U. S. 534, 535-536 (1973).[2] The water level of Pyramid Lake dropped some 40 feet between 1920 and 1938, reducing the surface area by about 20,000 acres and forming a delta which prevented the fish from gaining access to their Truckee River spawning grounds. PA 204a-205a, 208a-209a. Since 1940, as the level of the Lake continued to drop even further, one species of fish indigenous to the fishery, the cui-ui, was classified as "endangered," and another, the lahontan cutthroat trout, as "threatened" under the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.* 50 C. F. R. § 17.11 at 74, 75 (1981); PA 208a-209a. The cui-ui, a member of the sucker family, is found only in Pyramid Lake, and is the last remaining pure species in its genus (Chasmistes). *Carson-Truckee Water Conservancy District v. Watt*, 549 F. Supp. 207, — (D. Nev. 1982), The Pyramid Lake Paiutes' name for themselves is "kuyuidokado," cui-ui eaters. S. Wheeler, *The Desert Lake* 43 (1967); 25 Tr. 4731-32, 43 Tr. 8691.

Despite the severe changes in its ecology, Pyramid Lake's "potential for producing trout and other fish is much above probably any other lake [in North America]. 14 Tr. 2106. A properly developed Pyramid Lake with a restored fishery would provide enormous economic benefits, more than 10 million dollars annually, to the Pyramid Lake Tribe and Northwest Nevada. 8 Tr. 1008-09.

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[2]Maps depicting the area in question are reproduced in United States v. Alpine Land & Reservoir Co., 431 F. 2d 763, 765 (9th Cir. 1970), *cert. denied*, 401 U. S. 912, in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 259 (D. D. C. 1973), as an appendix to the United States' Motion for Leave to File Complaint in United States v. Nevada, No. 59 Original, 1972 Term, and JA 511.

The preservation of the lake and the restoration of its fishery to its full potential value are of national as well as regional concern. Washoe Project Act, 43 U. S. C. § 614c; H. R. Rep. No. 2055, 84th Cong. 2d Sess. 4-5 (1956), reproduced in 1956 U. S. Code Cong. & Admin. News 3758; PA 208a, 256a-257a. *See also* JA 509-10; California Assembly Joint Resolution No. 49 (Resolution Chapt. 130), 2 Statutes and Amendments to the Codes (California) 3655 (1970).

Pursuant to the Washoe Project Act, the federal government has funded three Lahontan cutthroat trout hatcheries (two of which are on the Reservation) for stocking Pyramid Lake, and the Marble Bluff Dam and Fishway at the mouth of the Truckee River. Completed in 1976, the dam and fishway enable the fish to bypass the delta and ascend to their traditional spawning areas. Since 1970, releases from Stampede Reservoir have helped provide the flows required for spawning purposes. PA 208a-209a; *Carson-Truckee Water Conservancy District v. Watt*, 537 F. Supp. 106, 549 F. Supp. 204 (D. Nev. 1982); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F Supp. 252 (D. D. C. 1973). And there is also a small experimental cui-ui hatchery on the Reservation. PA 208a. These efforts to restore the fishery "appear to justify optimism for eventual success." PA 208a-209a.

The Pyramid Lake Indian Reservation

The lower 20 miles of the Truckee River, all of Pyramid Lake, and the adjoining lands comprise the 475,000 acre Pyramid Lake Indian Reservation, which was established in 1859 and confirmed by an Executive Order in 1874. PA 182a, 199a. The contemporaneous documents establish that the area was set aside for the Paiutes because it "embrac[ed] large fisheries" which provided "a

sufficiency for the [Indians'] sustenance" and because it had "the advantage of being their home from choice." Exs. U-488, U-489, U-490, U-491,[2*] quoted and discussed in *United States v. Walker River Irrig. Dist.*, 104 F. 2d 334, 338 (1939). It was recognized at the time of its establishment that the reservation included "but a small portion of land suited for agricultural purposes." *Id.* The district court found that one of the purposes for establishing the Reservation was "to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance, at least in part, from these historic fisheries." PA 183a, 199a. *See Menominee Tribe v. United States*, 391 U. S. 404, 405-06 and n. 2 (1968); *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 87-89 (1918); *United States v. Sturgeon*, 27 Fed. Cas. 1357 (D. Nev. 1879), *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879).

The Newlands Reclamation Project

Congress enacted the Reclamation Act in June 1902. 32 Stat. 388. In March 1903, without additional congressional authority, the Secretary of the Interior approved construction of the Newlands Reclamation Project. A diversion dam on the Truckee River approximately 20 miles below Reno, known as Derby Dam, was completed in 1905.[3] The Project was originally planned to include more than 200,000 acres, but no more than 65,000 has ever been irrigated. PA 200a, 204a.

Between 1925 and 1967, more than 50% of the flow of the Truckee River, an average of approximately 260,000

[2*] See Appendix.

[3] Derby Dam originally had a fish ladder that enabled some of the trout to proceed upstream to their spawning grounds. 23 Tr. 4138-4140. It collapsed sometime after 1940. *Id.*

acre feet per year, was diverted at Derby Dam. Ex. U-621, reproduced in Tribe's Brief in Opposition to Certiorari in Nos. 81-7245 and 81-2276 at 2a.[4] Very little of the diverted flow returns to the Truckee River because most of the water is transported to the Carson River watershed to the east. The Newlands Project's diversions of "almost the whole volume of the Truckee River" lead to the virtual destruction of the Pyramid Lake fishery. PA 204a-208a.

The Project was originally operated by the United States Reclamation Service, an agency within the Interior Department. In 1926, the United States entered into a contract with the association of water users on the project, the Truckee-Carson Irrigation District (TCID), pursuant to which the United States retained title to the project works but delegated operational control to TCID. Ex. B-492.

The amount of water to which the Newlands Project is entitled is a matter of continuing controversy. *See* the litigation described in the Tribe's Brief in Opposition to Certiorari in Nos. 81-2245 and 81-2276 at 4-6. The eventual outcome of those pending cases as well as this one will determine the extent, if any, to which the legitimate requirements of the Newlands Project for water will be affected by the reserved rights claim made on behalf of the Pyramid Lake fishery.

The Orr Ditch Proceedings

In 1913, the United States initiated a suit to quiet title to Truckee River water rights in Nevada, *United*

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[4]An acre foot is the amount of water that covers an acre of land to a depth of one foot. There are 325,851 gallons in an acre foot.

States v. Orr Water Ditch Company, Equity No. A-3 (D. Nev.), hereafter *Orr Ditch.* Trial took place between 1919 and 1921, and the final decree was entered in 1944. PA 204a, 210a. "[T]he primary purpose of *Orr Ditch* was to secure the water rights for the [Newlands] reclamation project." PA 164a. *See also,* PA 184a. The United States sought and obtained the largest possible water right for the Newlands Project, (PA 200a-204a, 209a-210a, 58a-59a), but limited its claims on behalf of the Pyramid Lake Indian Reservation to relatively small rrigation rights that would not conflict with the rights claimed for the Newlands Project. PA 198a, 202a-207a, 243a-244a and n. 21, 165a-167a, 189a. A water right to fulfill the fishery purpose of the Pyramid Lake Indian Reservation was not asserted or actually litigated during the course of the *Orr Ditch* proceedings and was not included or mentioned in the final stipulated decree or any other court pleading or document. PA 198a, 245a, 189a.

Throughout the *Orr Ditch* proceedings, the United States purported to represent the interests of both the Pyramid Lake Indians and the Newlands Project's water users. PA 242a, 244a-245a. The Tribe did not participate in the *Orr Ditch* litigation. It was not consulted by government officials responsible for the law suit's prosecution, and was not asked to, and did not, approve the final stipulated decree. 24 Tr. 4483, 25 Tr. 4704-05, 4710-11, 42 Tr. 8553-54, 43 Tr. 8792, reproduced in App. to Tribe's Cross-Pet. at 1a-3a.

No one ever invited the Tribe to intervene or gave the Tribe any notice that its claim for a fishery water right was jeopardized or placed at issue in the *Orr Ditch* case. *See* PA 258a-259a. Indeed, the Indians were specifically informed by the Commissioner of Reclamation

that his Bureau would "carefully guard against taking any action which would impair the right of the Indians" to water for fishing. PA 206a. Newland Project water users retained attorneys who participated in the negotiations that led to the Truckee River Agreement, but they were never joined as parties in the litigation, and the United States "never relinquished or limited its representation of the Project's interests." PA 244a-245a.

Government officials were aware of the potential claim of a water right to maintain and preserve the Tribe's Pyramid Lake and Truckee River fisheries. The claim was discussed extensively. It was not asserted in the *Orr Ditch* litigation, however, because of "the larger interests involved in the proposition, having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." PA 204a-208a, 242a-245a, 161a-167a, 179a, 185a, 187a, 189a-190a; JA 342-43. No one in the government ever suggested that the claim was not meritorious. At one time the *Orr Ditch* court was apprised of the conflict between the water needs the Pyramid Lake fishery and diversions to the Newlands Reclamation Project by a government official employed by the Bureau of Indian Affairs. Ex. A-408, reproduced in App. to Tribe's Cross-Pet. at 4a-5a.

The Justice Department's *Orr Ditch* attorney expressly stated his understanding that the Tribe's water right for fishery purposes was not involved in the suit because:

> nothing is said about fish or water to be used for fish passing up and down the stream [in the bill of complaint and] nothing is said about this subject in any pleadings, nor was any testimony taken or any suggestions made from the beginning of the case down to the present time regarding fish.

PA 207a.

In the same letter, the government's litigating attorney stated his belief that the dispute between the two Interior Department agencies, Reclamation and Indians, should be resolved administratively rather than through the *Orr Ditch* litigation.

> Inasmuch as the Government has control of the Derby Dam, I have always thought that the Reclamation Service and the Indian Service, both bureaus of the Department of the Interior, could settle the matter between them as to providing the proper fishways and the comparatively small amount of water which ma ybe needed to enable the fish to pass up the fishways.

Id. See also, JA 321-24, 336-37; PA 244a n. 21. (Justice Department declined to bring court's attention to complaints that diversions to the Newlands Project were interfering with the Pyramid Lake Reservation's prior and paramount irrigation rights. "This matter it seems to me ought to be settled by the Interior Department as between its two bureaus. . . .").

Post-Orr Ditch Legal Proceedings

From 1926 to 1967, TCID operated the Project, including Derby Dam and the Truckee Canal diversion facilities, with a free hand. In 1967, the Secretary of the Interior promulgated regulations, 43 C. F. R. § 418, which "initiate[d] Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake." 43 C. F. R. § 418(b). These regulations are predicated in part on the obligation of the United States as trustee "to protect and preserve the rights and interests of the Pyramid Lake Tribe of Indians in the Truckee River and in Pyramid

Lake." *Id.* They were designed to implement both the Truckee and Carson River water right decrees, 43 C. F. R. §§ 418.1(b), 418.2(c), 418.3(a), 418.5, and to maximize the use of Carson River waters on the Newlands Project so as to make as much water as possible available to Pyramid Lake, 43 C. F. R. § 418.3(a).

The Secretary's operating criteria and procedures promulgated pursuant to the regulations in 43 C. F. R. § 418 were challenged by the Tribe and set aside in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D. C. 1973). The district court noted the project's "antiquated system" for delivering water and TCID's wasteful practices which "caus[e] substantial and wholly unnecessary diversion of water from the Truckee River to the obvious detriment of the Tribe." These practices include inadequate or non-existent measuring devices at the farm headgates, a flat rate water pricing policy that discourages conservation, and deliveries of water to lands that do not have water rights. *Id.* at 257. After further proceedings, the Secretary was ordered to reduce the total maximum diversions to the Newlands Project by more than 100,000 acre feet, from 406,000 acre feet established in the 1967 regulations to 288,129 acre feet in 1974 and succeeding years. *Id.* at 260-62.[5]

The controversy over the Secretary's operating criteria has continued. TCID refused to comply with the

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[5]The Tribe's suit also named the Attorney General as a defendant and sought to compel him to bring suit to establish the Tribe's water right for fishery purposes. The district court dismissed the Attorney General and this cause of action, see Pyramid Lake Tribe v. Morton, 360 F. Supp. 669, 672 (D. D. C. 1973), *reversed*, 499 F. 2d 1095 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 962. As explained *infra*, this issue eventually became moot.

criteria published in 1973 and succeeding years. Consequently, in September, 1973 the Secretary of the Interior terminated the government's 1926 contract with TCID and gave notice of the government's intent to take back operational control of the project works, including Derby Dam. In 1974, TCID filed suit challenging the validity of the contract termination and the post-1973 operating criteria. *TCID v. Secretary of the Interior,* Civil No. R-74-34 BRT (D. Nev.). That suit is still pending before the district court and TCID has continued to operate the project.

In 1972, the United States initiated an original action in this Court against the States of Nevada and California to establish the Tribe's water right for fishery purposes. The government's Motion for Leave to File its Complaint was denied without prejudice owing to the probable availability of obtaining appropriate relief in the federal district courts. *United States v. Nevada,* 412 U. S. 534 (1973).

Proceedings Below

In 1973, the United States filed a complaint in Nevada federal district court pursuant to 28 U. S. C. § 1345 alleging, *inter alia,* that in establishing the Pyramid Lake Reservation in 1859 there was reserved for the Tribe's benefit sufficient Truckee River water for the maintenance and preservation of the Pyramid Lake and Truckee River fisheries. The Pyramid Lake Tribe intervened as a plaintiff. The defendants consisted of all adverse claimants to the waters of the Truckee River and its tributaries in Nevada, including the class consisting of all water users within the Newlands Reclamation Project. Over the objections of the Tribe and the United States, the district court bifurcated the case and limited the ini-

tial trial to the issues of res judicata and collateral estoppel. PA 198a, 210a-211a; 71 FRD 10, JA 191-205.

The district court found that the claimed water right for fishery purposes had not actually been litigated in the *Orr Ditch* litigation. Accordingly, the collateral estoppel defense was rejected. PA 189a, 192a.[6] Although recognizing the fishery purpose of the Pyramid Lake Reservation, PA 183a, the district court dismissed the Tribe's complaint with prejudice. It also dismissed the government's complaint insofar as it sought a fishery water right for the Pyramid Lake Reservation.

"[P]rimary reliance [was] place[d] upon passage of the 1902 Reclamation Act." PA 161a. *See also,* PA 211a-212a, 214a-215a. That Act was held to have authorized the extinguishment of the Tribe's fishery water right for the benefit of the Newlands Reclamation Project, and the Secretary of the Interior was said to have exercised that authority by not asserting that right in the *Orr Ditch* litigation. PA 161a-167a, 179a, 185a, 187a, 189a. Accordingly, the district court ruled that the United States did not have a "prohibited" or "impermissible" conflict of interest in the *Orr Ditch* case. The Tribe and the United States were held to be barred from litigating the fishery water right which was found to have been a relinquished part of the government's *Orr Ditch* cause of action. PA 188a, 189a-190a, 192a.

The court of appeals affirmed in part, reversed in part, and remanded the case for trial. It overturned the district court's reliance on the Reclamation Act, holding that Section 8 of that law, 43 U.S.C. § 372, construed in *California v. United States,* 438 U.S. 645 (1978), pre-

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[6]No appeal was taken from either of these rulings.

vented the Secretary from extinguishing Indian water rights for the benefit of the reclamation project. PA 215a-222a. Nor was the Tribe's water right extinguished by congressional ratification subsequent to *Orr Ditch*. PA 246a-247a.[7]

On res judicata, the court of appeals first affirmed the district court's holding that the fishery water right was encompassed in the government's *Orr Ditch* cause of action. PA 224a-226a. Then the court reviewed the Tribe's contention that preclusion of its claimed fishery water right would result in a denial of procedural due process owing to the government's inadequate and improper representation of the Tribe's interests in the *Orr Ditch* litigation. PA 226a-240a. It ruled that the Tribe is entitled to due process protection, PA 226a-238a, and assumed, and later in the opinion found, that the government's representation of the Tribe in *Orr Ditch* was improper and inadequate. PA 237a-238a, 239a, 242a-243a. The Tribe's constitutional right to procedural due process was held to have been satisfied based on the trial court's finding that the *Orr Ditch* defendants did not have actual knowledge of the government's failure to represent the Tribe adequately. PA 236a-238a, 258a. The end result of this analysis was that the Tribe was foreclosed from litigating its claimed fishery water right against the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators. PA 238a-240a.

But the court rejected the res judicata defense of TCID and the water users on the Newlands Project. The interests of both the Project and the Pyramid Lake

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[7]The petitions for certiorari filed by Nevada and TCID, Nos. 81-2245 and 81-2276, do not challenge these aspects of the court of appeals' decision.

Reservation were represented by the same government attorneys, so there was no adversity between the Tribe and TCID. Since the fishery water right was not actually litigated in *Orr Ditch*, res judicata could not bar the Tribe's claim against co-nonparties who were represented simultaneously by the same government attorneys. PA 240a-246a.

The case was remanded for determinations of whether the Tribe is entitled to a water right for its fishery and, if so, how much water is needed to satisfy that right. Any water subject to the *Orr Ditch* decree that is awarded to the Tribe for fishery purposes would have to come out of the government's entitlement for the Newlands Project. PA 248a-249a, 258a. The Tribe's Cross-Petition is directed to the portion of the Ninth Circuit's judgment upholding the res judicata defense of the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators.

SUMMARY OF ARGUMENT

Parties cannot be precluded from asserting claims or litigating issues by operation of either res judicata or collateral estoppel unless they have been provided with a full and fair opportunity to be heard. All of the rules that have been developed for applying res judicata and collateral estoppel embody this fundamental constitutional principle.

The massive conflict presented in the *Orr Ditch* litigation between the interests of the Newlands Reclamation Project and the Pyramid Lake Indian Reservation, both of which were "represented" by the same government attorneys, permeates all aspects of this case. The existence of that conflict is one of the principle reasons

why the Tribe's claimed fishery water right was not part of the same cause of action that was presented in the *Orr Ditch* case. And even if it was part of the same cause of action, precluding the Tribe from litigating that claim would result in a denial of procedural due process.

The Tribe was not a party to the *Orr Ditch* case. The cause of action that it is asserting in this case is necessarily different from the cause of action that was brought vicariously on its behalf by the United States in *Orr Ditch*. Since the causes of action are not the same and the claim for a fishery water right was not actually litigated in *Orr Ditch*, the Tribe's claim cannot be barred.

The Justice Department attorneys responsible for the *Orr Ditch* case stated that the fishery water right was not encompassed in that case. It would involve proof of vastly different facts than would be required to establish an irrigation water right and it could not be litigated in the same case in which the United States was asserting conflicting claims on behalf of the Newlands Reclamation Project. This conclusion was clearly correct under the contemporaneous standards for determining whether claims are duplicative. It was also supported by the leading water law treatises published just prior to the initiation of the *Orr Ditch* case. It would be fundamentally unfair to apply more modern criteria retroactively in a manner that results in the Tribe being deprived of its most valuable property right.

But even under modern pragmatic rules, the fishery water right is separate and distinct from the irrigation water right that was asserted and litigated in *Orr Ditch*. In addition to requiring proof of different facts, it would not have been proper, legal, or possible for the government to have asserted a tribal claim that, if granted,

would interfere with the right being sought in the same case by the government on behalf of the water users on the Newlands Project. In order to safeguard the integrity of representative functions, claims that are sought by a person or entity appearing in one capacity do not merge with a claim that that same person or entity can assert in other capacities. And in quiet title suits such as *Orr Ditch*, the subject matter and the reach of the judgment are defined by the property that the plaintiff places in issue together with all of the defendants' adverse claims. In the absence of counterclaims or cross-complaints, a plaintiff is not required to litigate all related claims to different property in the same suit even though they arise out of the same transaction and could be asserted against the same defendants. These considerations that specifically relate to the impossibility, difficulty, and lack of necessity for claiming a fishery water right for the Tribe in the *Orr Ditch* litigation, overcome the parties' general intent to make the *Orr Ditch* adjudication as comprehensive as possible.

For all these reasons, the fishery water right asserted by the Tribe in this case is not the same cause of action as that which was presented by the government in *Orr Ditch*.

Assuming *arguendo* that the two causes of action are the same, the Tribe cannot be precluded from litigating its claim to a fishery water right. It was not provided with notice that the fishery water right was placed in jeopardy in *Orr Ditch*. A full and fair opportunity to litigate that claim was not provided by virtue of the government's purported representation of the Tribe's interest owing to the direct conflict between the Truckee River water needed for the Tribe's fishery and the Truckee

River water claimed by the United States on behalf of the Newlands Reclamation Project. Since the government decided not to assert and litigate the fishery water rights claim because it would have been inconsistent with the "larger" interests of the Newlands Project, the knowledge or lack of knowledge of the *Orr Ditch* defendants is irrelevant. The Tribe cannot constitutionally be deprived of its cause of action if the government's misfeasance results in the Tribe being denied the opportunity to present its case and to have its merits fairly judged.

I.

The Fishery Water Rright is Not Part of the Orr Ditch Cause of Action

A. General Principles

Res judicata is an equitable, judicially created, doctrine aimed "at the achievement of substantial justice." It embodies the principle, guaranteed by the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution, that a litigant is entitled to "one full and fair opportunity for judicial resolution" of an issue or claim. *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U. S. 313, 324-25, 328, 329, 334 (1971). Unless that opportunity is provided, parties cannot be precluded by operation of either res judicata or collateral estoppel. *Kremer v. Chemical Construction Co.*, 102 S. Ct. 1883 (1982).[8] This fundamental constitutional requirement, implicated by the government's conflict of interest that marred its representation of Indian interests in *Orr Ditch*, permeates all issues presented by this case.

Under res judicata, a final judgment on the merits in a prior suit bars a second suit involving the same par-

[8]The *Kremer* dissenters agreed with the majority on this point. See 102 S. Ct. at 1905 n. 11.

ties or their privies based on the same cause of action. The preclusive effect of the judgment extends not only to every matter which was offered and received to sustain or defeat the claim or demand, but also to all grounds for, or defenses to, recovery that might have been offered. *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 578-79 (1974). Under collateral estoppel, by contrast, the second action is based on a different cause of action and the judgment in the prior suit only precludes relitigation of issues actually litigated and necessary to the outcome of the first action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

In the instant case, the Tribe's claim of a fishery water right was neither asserted nor actually litigated in the *Orr Ditch* proceeding. PA 189a, 198a, 245a. Consequently, collateral estoppel is inapplicable. *Brown v. Felsen, supra*, 442 U.S. 127, 139 n.10; PA 192a. In order for the Tribe's claim to be barred by res judicata, the Court first must find, "only after careful inquiry," that the claim for a fishery water right is the same cause of action presented in *Orr Ditch* that not only could, but should, have been asserted and litigated in that case. *Brown v. Felsen, supra*, 442 U.S. at 132, 134-38.

Determining whether claims are duplicative for res judicata purposes "is not a matter of precision nor subject to the application of any mechanical formula." *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977), *cert. denied*, 434 U.S. 903; 1B *Moore's Federal Practice*, ¶ 0.410 [1] at 1157-58 (2d ed. 1982); *Restatement (Second) of Judgments* § 24, comment b (1982). Distinct matters, each of which would authorize independent relief, need not be presented in a single suit, even though

they existed at the same time and might have been considered together. *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 490-91 (1919); *United States v. The Haytian Republic*, 154 U. S. 118, 124-25 (1894). And the same transaction or wrong may give rise to more than one cause of action. *Sea-Land Services, Inc., v. Gaudet*, 414 U. S. 573, 577-78 (1974); *Lawler v. National Screen Service Corp.*, 349 U. S. 322, 327-28 (1955). *See also, Reno Club v. Harrah*, 70 Nev. 125, 129, 260 P. 2d 304, 306 (1953). Through the years, the courts have applied various tests to distinguish one cause of action from another. *See* 1B *Moore's Federal* Practice ¶ 0.410[1] at 1157-58 (2d ed. 1982).

As demonstrated in Part II *infra*, this case raises a significant constitutional issue, whether barring the Pyramid Lake Tribe from asserting its claimed water right for fishery purposes constitutes a denial of procedural due process. That question need not be resolved if the Court holds that fishery water right is separate and distinct from the Government's *Orr Ditch* cause of action. Accordingly, we first address the identity of claims issue, keeping in mind "the cardinal principle" that the Court will strain hard to avoid ruling on constitutional questions. *United States v. Security Industrial Bank*, — U. S. —, 51 USLW 4007 (No. 81-184, November 30, 1982).

B. The Tribe's Cause of Action is Necessarily Different

The Pyramid Lake Tribe was not a party in the *Orr Ditch case*. To the extent that its claimed fishery water right was involved in *Orr Ditch*, it was placed at issue through the government's purported representation of the Indians' interest. For this reason alone, the cause of action brought by the Tribe in this case differs from the *Orr Ditch* cause of action.

In *Montana v. United States*, 440 U. S. 147, 154 (1979), the Court held that the doctrine of collateral es-

toppel, rather than res judicata, governs preclusion defenses raised against nonparties to the prior suit because "the cause of action which a nonparty has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right." Under this rule, the Tribe's fishery water rights claim is not barred. The Tribe's cause of action is necessarily different from the claim that was "vicariously" asserted by the United States in *Orr Ditch* and is therefore subject to preclusion under collateral estoppel, but not by operation of res judicata. Since the fishery water right was not asserted or determined in *Orr Ditch*, collateral estoppel does not apply. *See supra* at 19.

This result is fair to all concerned parties. It recognizes that the United States often litigates in different capacities, *Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 (1972), that the interests of the United States are not always identical to, or even compatible with, those of its Indian beneficiaries, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), and that an Indian tribe's right to sue in its own right and for its own cause of action are separate and distinct from, and independent of, the government's, *Oneida Indian Tribe v. County of Oneida*, 414 U.S. 661 (1974); *Poafpybitty v. Skelly Oil Company*, 390 U.S. 365, 370-72 (1968); 25 U.S.C. § 476.[9] It also protects the legitimate reliance interests of those who litigate against the government by prohibiting relitigation of issues that were actually determined. It would not, however, result in the forfeiture of nonparties' rights that

[9]In this respect the relationship between the United States and Indian tribes differs from the ordinary trustee-beneficiary relationship in which only the trustee is vested with authority to sue third parties. Bogert, *Trusts and Trustees* § 869 (2d rev. ed. 1982).

were not asserted owing to the government's multifarious and conflicting interests.

C. Same Evidence Test

During the course of the *Orr Ditch* litigation, the responsible Justice Department attorneys stated that the claim of a water right for fishery purposes was entirely outside of its scope. PA 207a. The principle basis for their belief was that nothing was said about fish or about the need for water for fish purposes in the complaint, any other pleading, or in any of the testimony. *Id.* They also believed that disputes involving conflicts between the interests of the Newlands Project and the Pyramid Lake Indian Reservation were administrative matters, not questions for litigation. *Id.*; PA 244a n. 21. The court of appeals acknowledged that quantifying the Tribe's water rights for fishery purposes and its right to water for agricultural purposes requires proof of different facts. PA 225a. Under the "same evidence" test for determining the identity of claims set forth in *United States v. The Haytian Republic*, 154 U. S. 118, 125 (1894),[10] and Section 61 of the first *Restatement of Judgments* (1942),[11] the water right for fishery purposes therefore would be considered a separate cause of action from the irrigation water right asserted for the Pyramid Lake Reservation by the government in *Orr Ditch*.[12]

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[10]*See also, Reno Club v. Harrah*, 70 Nev. 125, 129, 260 P. 2d 304, 306 (1953).

[11]"Where a judgment is rendered in favor of the plaintiff or where a judgment on the merits is rendered in favor of the defendants, the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, *if the evidence needed to sustain the second action would have sustained the first action.*" (Emphasis added.)

[12]To establish a reserved water right, the claimant must prove the existence of a reservation, the date of its creation and

(Continued on next page)

Moreover, in the instant case, unlike *United States* v. *California & Oregon Land Co.*, 192 U. S. 355 (1904), the unasserted claim was not simply another ground or theory aimed at obtaining the same property. The irrigation water right is appurtenant to, and is part and parcel of, specified tracts on the Pyramid Lake Reservation, 3130 acres of bottom lands and 2745 acres of bench lands. PA 57a-58a. By contrast, the fishery water right is separate and apart from these irrigable lands; it is appurtenant to Pyramid Lake and the Truckee River. *Cappaert v. United States, supra; Los Angeles v. Aitken*, 10 Cal. App.

(Continued from previous page)

its purposes, as well as the necessity of reserving water to accomplish those purposes and the amount required to fulfill them. Cappaert v. United States, 426 U. S. 128, 133-34, 138-39, 141-42 (1976); Arizona v. California, 373 U. S. 546, 598-601 (1963), 376 U. S. 340, 344-45 (1964) (decree). The water rights for fishery and irrigation purposes share some common elements, particularly the existence and date of the reservation. But the facts relevant to proving the fishery purpose and the necessity and amount of water required to fulfill that purpose are entirely different. The fishery purpose is established by showing that the Paiutes fished for their subsistence and livelihood and that their fishery, Pyramid Lake, was included in their reservation. *See Menominee Tribe v. United States*, 391 U. S. 404, 405-06 (1968); Alaska Pacific Fisheries v. United States, 248 U. S. 78, 88 (1918). The necessity of water to fulfill that purpose is proved by the facts that Pyramid Lake's fish need fresh water to spawn, that they cannot ascend to their spawning grounds without adequate flows in the lower Truckee River, that the quality of Pyramid Lake's water will deteriorate if it does not receive sufficient inflow to offset evaporation losses, and that the fish and their food chains require maintenance of the quality of the lake's waters in order to maintain viable populations. Establishing the amount of water requires proof of such matters as the volumes and temperatures necessary to achieve successful natural reproduction and the effect of increasing deterioration of the quality of Pyramid Lake's water on the fish and their food chains. *See* Carson-Truckee Water Conservancy District v. Watt, ___ F. Supp. ___ (D. Nev. 1982); Ex. U-580. These facts have nothing to do with proving a water right for irrigation purposes. *Compare* Arizona v. California, *supra*, 373 U. S. at 598-601.

2d 460, 52 P. 2d 585 (1935). Water for the fishery is in addition to whatever water is required to fulfill the reservation's irrigation purpose. *See Colville Confederated Tribes v. Walton*, 647 F. 2d, 42, 47-48 (9th Cir. 1981), *cert. denied*, 454 U. S. 1092; F. Cohen, *Handbook of Federal Indian Law* 588-89 (1982).

The two leading water law treatises published just prior to the initiation of the *Orr Ditch* litigation, S. C. Weil, *Water Rights in the Western States*, (3 ed. 1911); C. S. Kinney, *Irrigation and Water Rights* (2d ed. 1912), lend added credence to the position of the Justice Department lawyers that the fishery water right was a separate cause of action. According to Kinney:

> [A judgment and decree] are not conclusive as to matters which might have been decided therein, but only as to such matters which were in fact decided. . . . As to the subject matter of the action, the judgment and decree will be deemed res judicata only to the extent of the matters definitely decided by it.

2 *Irrigation and Water Rights, supra*, § 1563 at 2829-31. Similarly, Weil states:

> [T]he decree is res adjudicata between the parties and issues only, however, and not upon persons not made parties, nor as to rights of actual parties of which no issue was made. . . . Matters not adjudicated by the decree . . . may be sought in an independent proceeding.

2 *Water Rights in the Western States, supra*, § 1233 at 1137. *See also, Masterson v. Pacific Livestock Co.*, 144 Or. 396, 403, 24 P. 2d 1046, 1048 (1933); *Union Mill & Mining Co. v. Dangberg*, 81 F. 73, 116 (D. Nev. 1897).

The court of appeals rejected the same evidence test in favor of more modern criteria. PA 224a-225a.[13] To be

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[13]The Tribe argues *infra* at 25-37 that it also prevails under the newer standards.

sure, the trend of the law has been toward "expansion of the definition of claim in bar and merger contexts." *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 327 (1971). *See, e.g., Southern Pacific Co. v. Bogert*, 250 U.S. 483, 490-91 (1919). But it is fundamentally unfair to apply these new standards retroactively, and thereby deprive the Tribe of its most valuable property right by barring a claim that is belatedly found to have been part of the same action that was commenced in 1913, tried from 1919 to 1921, and finally completed in 1944. *United States v. Security Industrial Bank*, — U.S. —, 51 USLW 4007 (No. 81-184, November 30, 1982); *Union Pacific Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) ("The rule [to consider legislation as addressed to the future, not to the past] is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.") Accordingly, the determination of whether the fishery water right should have been claimed in *Orr Ditch* should be made by reference to the standards applicable when that litigation was pending. Based on those standards, the Justice Department attorneys correctly concluded that the fishery water right was not encompassed in the irrigation water right for the Reservation that was placed at issue in *Orr Ditch*.

D. Pragmatic Considerations

The emphasis in the newer rules for determining whether a single cause of action has been split is on pragmatic considerations. *See Restatement (Second) of Judg-*

ments § 24 (1982).[14] Illustrative of such considerations are:

> whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second), supra, § 24(2). In practice, the outcome seems to turn on whether the plaintiff has good reasons for not having asserted the claim in the prior suit. *See Brown v. Felsen,* 442 U. S. 127, 135-38 (1979); *Sea-Land Services v. Gaudet,* 414 U. S. 573, 591-92 (1974). While the Tribe's primary submissions are that the identity of claims issue should be decided by reference to the standard in effect when *Orr Ditch* was in litigation and that the Tribe's cause of action is necessarily different from the government's, it contends in the alternative that it prevails under the factors identified in Section 24(2) of the *Restatement (Second).*

(i) The facts—The claims for fishery and irrigation water rights share some common elements but the evidence needed to sustain them differs in major respects. *See supra* at 22-24 & n. 12. Since 1975, the United States has expended approximately $5,000,000 for biological studies and research aimed at quantifying the fishery's water requirements. *See also,* JA 509-10. The facts developed in these investigations are unrelated in time, space, origin and motivation to the facts involved in *Orr Ditch.*

(ii) The convenience of the trial unit—The government's primary purpose in initiating *Orr Ditch* was "to secure water rights for the Newlands Project." PA 164a.

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[14]The *Restatement (Second)* was published after the court of appeals' decision was issued. While there are no significant substantive differences between the tentative drafts cited by the court of appeals and the final version, the organization and numbering of the sections were changed. All references in this Brief are to the final publication.

It would have been impossible as well as unethical for the United States to have asserted a claim for a fishery water right on behalf of the Pyramid Lake Indian Reservation that would have interfered with the rights it was already claiming for the Newlands Project in the *Orr Ditch* proceeding.[15]

Having initiated the *Orr Ditch* case on behalf of the water users on the Newlands Project, it would have been improper for the United States to have asserted a conflicting claim on behalf of the Pyramid Lake Indians. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Restatement (Second) of Trusts* § 170, and Comments p, q, and r (1959); Bogert, *Trusts and Trustees* § 593 (2d rev. ed. 1980); PA 235a-236a, 242a. *Cf. Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n. 1 (1979); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 812 (1976); *Manygoats v. Kleppe*, 558 F. 2d 556, 558 (10th Cir. 1977); *New Mexico v. Aamodt*, 537 F. 2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121; *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F. 2d 1082, 1085 (9th Cir. 1972).[16] Indeed, if the water right for fishery purposes had been asserted by the United States, the court, acting on its own, would have been required to

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[15]The *Orr Ditch* case was brought in 1913, but the first mention of the possibility of claiming a fishery water right for the Pyramid Lake Reservation was in a letter written in 1922, almost a year after the close of evidence in the *Orr Ditch* trial. PA 205a.

[16]The government's attorneys obviously were aware of this problem. They took great pains to insure that the irrigation water right asserted for the Pyramid Lake Reservation would not conflict with the right sought for the Newlands Project, PA 203a-204a, 243a-244a, and they refused to bring any matter to the court's attention that pitted the interests of the Indians against those of the Newlands Project. PA 207a, 244a, n. 21. The water users on the Newlands Project insisted on the government's undivided allegiance. Ex. U-242.

intervene to prevent improper Justice Department representation of conflicting interest. *United States v. Johnson*, 319 U. S. 302, 305 (1943); *United States v. Southern Pacific Transportation Co.*, 543 F. 2d 676, 680, n. 3 (9th Cir. 1976); *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 92, 98-99 (S. D. N. Y. 1972). *See also infra* at 28-30, 31-34.

Moreover, the fishery water right could not have been asserted in the *Orr Ditch* case by the government because it would not have been a justiciable issue. *Compare, United States v. Nixon*, 418 U. S. 683 (1974); and *United States v. ICC*, 337 U. S. 426 (1949). In both *Nixon* and *ICC*, "the United States" was involved on both sides of a dispute and it was claimed that the matter therefore was not a justiciable case or controversy within the meaning of Article III of the Constitution. When such allegations are made, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *ICC, supra*, 337 U. S. at 430; *Nixon, supra*, 418 U. S. at 693. The inquiry is whether the "issues are 'of a type which are traditionally justiciable,'" *Nixon, supra*, 418 U. S. at 697, and whether the government's posture in the litigation "in any way prevents a full defense" of one side or the other, *ICC, supra*, 337 U. S. at 432.

Nixon and *ICC* held that notwithstanding the "surface anomaly," 337 U. S. at 432, the disputes involved in those cases presented justiciable controversies. There was the requisite adversity of interest between the real parties in interest and an opportunity for both sides of the controversy to be represented. In *ICC*, the United States, in its capacity as shipper, represented one side and the Interstate Commerce Commission, which was separately

represented, as well as the railroads, "are authorized to interpose all defenses to the government's charges." 337 U. S. at 432. In *Nixon*, the United States was represented by the Special Prosecutor who had been delegated "unique authority and tenure" by the Attorney General. 418 U. S. at 694. The President retained his own counsel to urge his claims of executive privilege. "This setting assures there is 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" 418 U. S. at 697. *See also, Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 37-39 and n. 16 (1976); *Flast v. Cohen*, 392 U. S. 83, 94-101 (1968).

In *Orr Ditch*, by contrast, the United States was the only party asserting the claims of both the water users on the Newlands Project and the Indians of the Pyramid Lake Reservation. The same Justice Department attorneys were representing these conflicting interests. Unlike *ICC* and *Nixon*, no mechanism existed to enable both arms of the United States to be represented by separate and independent counsel capable of complete fidelity to their respective client interests. The concrete adversity essential to the invocation of Article III courts would not have been present. In effect, the United States would have been asking for an advisory opinion in contravention of Article III of the Constitution. *Flast v. Cohen, supra*, 392 U. S. at 95 n. 11 and 96-97; *Muskrat v. United States*, 219 U. S. 346, 361-62 (1911). When a suit is lacking "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process," it is the court's duty "set aside any adjudication thus procured and dismiss the cause without

entering judgment on the merits." *United States v. Johnson*, 319 U. S. 302, 305 (1943).[17]

For these reasons, for the United States to have presented the fishery water right on the Tribe's behalf along with the right claimed for the Newlands Project would not only have been "inconvenient", but also unethical, illegal, and impossible. Alternatively, these same considerations bring this case within the specific exceptions to the general rule against splitting a single cause of action. *See Restatement (Second) of Judgments*, §§ 26 (1) (d), 26(1)(f) (1982).

(iii) The parties' expectations.—The court of appeals' determination that the fishery and irrigation water

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[17]The fishery water right might have been susceptible of judicial resolution if it had been presented in another context. *Cf. Johnson, supra; Muskrat, supra.* For example, the United States might have joined the Pyramid Lake Tribe as a party and, as it did in *New Mexico v. Aamodt, supra*, 537 F. 2d at 1105-1107, provided funds for the Indians to retain independent private counsel. Or it might have joined the water users on the Newlands Reclamation Project as parties, as it has done in this case, so that the United States could have advocated only the Indians' interests. It might have joined both the Tribe and the Newlands' water users and remained passive while the controversy was litigated between the two beneficiaries. *See Healing v. Jones*, 210 F. Supp. 125, 129-32 (D. Ariz. 1962), *aff'd.*, 373 U. S. 758. But implementing any of these options would have resulted in a fundamental change in the *Orr Ditch* litigation. It would not have been the same case. *Compare Muskrat, supra.*

In considering these theoretical possibilities, it should also be kept in mind that the government's attorneys were not aware of the conflicting fishery claim until after the close of evidence in the *Orr Ditch* trial. *See supra*, at 27 n. 15. Thus, there was no occasion even to consider structuring the case in a different fashion prior to 1922. By that time, there were severe practical constraints on any effort to assert new claims to significant quantities of water. *See* PA 208a. In any event, we are not aware of any authority holding that res judicata operates to bar the assertion of a claim that would have necessitated the joinder of additional parties, the realignment of existing parties, or a basic alteration in the nature of the proceeding.

rights are part of the same cause of action was predicated on the parties' general intent to make the *Orr Ditch* litigation as comprehensive as possible. PA 225a. While this is undoubtedly a relevant factor, it is not the only one. In the circumstances of this case it should not be regarded as conclusive for several reasons.

First, the only specific evidence of the parties' expectations concerning the fishery water right is the unequivocal statement of the Justice Department attorneys that it was not encompassed in the case. PA 207a. As we have seen (*supra* at 22-25, 27-30), this conclusion was supported by existing law and, as a practical, jurisdictional, and ethical matter, there was no other choice.

Second, the legitimate expectations of all of the *Orr Ditch* parties also should have taken account of the then prevailing standard for determining identity of claims, the same evidence test. *See supra* at 22-25. They should also have considered the treatment of res judicata in the leading water law treatises, Kinney and Weil, *supra* at 24. These contemporaneous authorities would have led all of the *Orr Ditch* parties to conclude that the fishery water right was not encompassed in the *Orr Ditch* suit. *See, e. g.*, Exs. U-22, U-182.

Third, the United States participated in the *Orr Ditch* litigation in dual representative capacities, appearing on behalf of both the Indians of the Pyramid Lake Reservation and the water users on the Newlands Reclamation Project. PA 242a. This was apparent on the face of the *Orr Ditch* complaint, PA 2a-11a, and has an important bearing on the legitimate expectations of the parties concerning the scope of the suit.

Special res judicata rules have been formulated to deal with situations in which one person or entity appears in litigation on behalf of another. The overriding prin-

ciple is that "a fiduciary should not be subjected to conflicts between the different interests that he represents." 1B *Moore's Federal Practice* ¶0.411[3] at 1423 (2d ed. 1982). Hence, "[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." *Restatement (Second) of Judgments* § 36 (1982).[18] The purposes of this rule are "to safeguard the integrity of representative functions" and to insure that "a person appearing on behalf of another . . . act[s] with complete fidelity to the interests of the beneficiary, uninfluenced by consideration of his own interest or advantage," *Restatement (Second), supra,* § 36, comment a. "[A] person [appearing as a representative of another] should be free to take positions inconsistent with those he might assert in litigation on his own behalf or on behalf of others he represents in some other fiduciary capacity." *Id.*

These principles concerning representative capacities are relevant to the determination of whether a single cause of action has been split.

> [A] judgment on a claim favorable to plaintiff appearing in one capacity does not result in the merger therein of a claim he may have in another capacity, nor does an adverse judgment bar him from asserting such another claim. . . . The rule regarding splitting a claim . . . does not prevent a party who brought an action in one capacity from bringing another action in a distinct capacity even though the claims arise out of the same transaction.

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[18] Section 36 of the *Restatement (Second)* is a simplified version of Section 80 of the first *Restatement of Judgments* (1942). *See Restatement (Second), supra,* § 36, Reporter's Note.

Restatement (Second), supra, § 36, comment a. *See also, Restatement of Judgments,* § 80, comments b, f (1942).[19] *Compare United States v. California & Oregon Land Co.,* 192 U. S. 355 (1904). It is substance, not form, that governs the application of this rule. *Chicago R. I. & P. Ry. Co. v. Schendel,* 270 U. S. 611, 618, 620 (1926); *United States v. Jensen,* 608 F. 2d 1349, 1355 (10th Cir. 1979); 1B *Moore's Federal Practice* ¶0.411[3] at 1423 (2d ed. 1982). "Parties nominally the same may be, in legal effect, different; . . . and parties nominally different may be, in legal effect, the same." *Chicago R. I. & P. Ry. Co. v. Schendel, supra,* 270 U. S. at 620.

In the *Orr Ditch* case, the government's "primary purpose" was "to secure rights for the Newlands Project." PA 164a. Its appearance on behalf of the Pyramid Lake Indians was confined to asserting small claims that were not inconsistent with the Project's water needs. *See supra,* at 27 n. 16. Giving effect to the substance of the rule embodied in Section 36 of the *Restatement (Second), supra,* and assuring the integrity of representative functions compels the conclusion that the government's *Orr Ditch* claims should not be deemed to have been merged with other inconsistent or conflicting claims held by the United States in a different representative capacity. At the very least, the different capacities in which

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[19]Under this rule, if the United States had appeared in *Orr Ditch* solely on behalf of the Newlands Project, the resulting judgment would not have been binding on the United States in its capacity as trustee for any of the Pyramid Lake Tribe's water rights. It would be odd, ironic, and tragic if the government's decision to assert a small irrigation water right on behalf of the reservation that was thought to be compatible with the water needs of the Newlands Project had the unintended effect of barring the much larger and more important claim that was not and could not have been presented. *See* PA 201a-204a, 243a-244a & n. 21.

the United States appeared and litigated the *Orr Ditch* case coupled with other equally obvious considerations,[20] were sufficient to put the *Orr Ditch* defendants on actual or constructive notice that the government's *Orr Ditch* cause of action did not merge with inconsistent claims on behalf of other third parties. *See Werlein v. City of New Orleans*, 177 U. S. 390 (1900); *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n.*, 19 Cal. 2d 807, 122 P. 2d 892, 895-96 (1942). Any other expectation would not have been reasonable.

The fourth relevant factor in determining the legitimate expectations of the parties is the nature of the *Orr Ditch* suit. It was a quiet title action initiated in 1913. *Orr*

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[20]The *Orr Ditch* defendants are charged with knowledge of the laws under which the United States has assumed the fiduciary obligation of representing reservation Indians in all suits in law and equity. 25 U. S. C. § 175; Wilson v. Omaha Indian Tribe, 442 U. S. 653, 657 n. 1 (1979); Schweiker v. Hansen, 450 U. S. 285 (1981), *reaffirming* Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 384-85 (1947). All matters of which their attorneys had actual or constructive notice are also attributable to them. Smith v. Ayer, 101 U. S. 320, 326 (1880).

The district court found that practically everyone knew about the serious decline of the Pyramid Lake-Truckee River fisheries owing to the enormous diversions of Truckee River water to the Newlands Project. PA 185a-186a, 187a. *See also*, PA 205a, 208a. The *Orr Ditch* defendants or their attorneys knew or should have known about the fishery purpose of the Pyramid Lake Reservation, see United States v. Sturgeon, 27 Fed. Cas. 1357 (D. Nev. 1879), *affirmed*, 27 Fed. Cas. 1358 (9th Cir. 1879), the Court's contemporaneous decisions protecting the fishery rights of other tribes, *e. g.*, Seufert Bros. Co. v. United States, 249 U. S. 194 (1919); Alaska Pacific Fisheries v. United States, 248 U. S. 78 (1918); United States v. Winans, 198 U. S. 371 (1905), and the reserved water rights doctrine of Winters v. United States, 207 U. S. 546 (1908). These considerations led a non-attorney employee of the Indian Service to conclude in 1922 that the Pyramid Lake Indians may be entitled to "a prior right to sufficient water from the Truckee River to enable these trout to reach their natural spawning beds, in order that they may reproduce themselves." PA 205a. *See also*, PA 201a-202a; JA 318-24, 337, 390, 474-75; Exs. U-163; U-22; U-182; V-413.

Ditch should not be confused with the more modern, *in rem*, statutory proceeding known as a general stream adjudication which was developed to avoid piecemeal determination of disputes. *See* 6 *Waters and Waters Rights* § 530.2 (R. Clark ed. 1972). *See generally*, 6 *Waters and Water Rights, supra*, Chapts. 28, 29; Stone "Are There Any Adjuidicated Streams in Montana?," 19 Mont. L. Rev. 19 (1957).

In quiet title actions, the subject matter and reach of the judgment are defined by what the plaintiff places in issue.

> The purpose of a suit to remove a cloud or a statutory action to quiet title is to determine adverse claims to real property. Such actions presuppose some title or interest in the plaintiff which he wishes to judicially establish as superior to some claim or title adverse thereto asserted by the defendant. To the extent that title is in issue and adjudicated the judgment or decree is conclusive in any subsequent suit of every claim or ground which was or might have been urged in support of or against it, *though the effect of the adjudication is confined to the particular land in suit.*

2 *Freeman on Judgments* § 874 [5th ed. 1925], emphasis added.

Once a court of equity obtains personal jurisdiction over the defendants in a quiet title action, they are required to put in issue all of their claims that are adverse to those asserted by the plaintiff. That is what happened in *Orr Ditch*. JA 310-1[illegible] The resulting decree adjudicates the defendants' respective rights not only against the plaintiff but also against each other. 6 *Water and Water Rights*, supra, §513.2 But in the absence of a counterclaim or cross-complaint, a plaintiff is not under any obligation to litigate all related claims to different prop-

erty in a single suit even though two or more such claims arise out of the same transaction or circumstances and could be asserted against the same defendant. *Lynch v. Kemp*, 4 Cal. 2d 440, 49 P. 2d 817 (1935).[21] The parties' intent to make the adjudication as comprehensive as possible cannot alter the nature of the action or confer jurisdiction that is otherwise lacking. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 294 (1980).

The Tribe's fishery and irrigation water rights are separate and distinct properties and are appurtenant to different lands. *See supra* at 23-24. Hence, the United States was not compelled to place both of them at issue simply because one claim was presented. There were procedures by which the *Orr Ditch* defendants could have insured that the United States asserted all of its potential water rights claims. They could have filed counterclaims or cross complaints against the United States. Not having availed themselves of these opportunities, they and their successors should not be heard to complain about the subject matter of quiet title suits being limited to the specific property placed at issue by the plaintiff and all of the defendants' adverse claims.

In sum, based on pragmatic considerations, the fishery water right for the Pyramid Lake Reservation should not be considered part of the government's *Orr Ditch* cause of action. The irrigation and fishery water rights require proof of substantially different facts. The fishery water right was not, could not have been, and should not

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[21] *Contrast* United States v. California & Oregon Land Co., 192 U. S. 355 (1904); Iselin v. Meng, 307 F. 2d 455 (5th Cir. 1962), *cert. denied*, 372 U. S. 909; Hatchitt v. United States, 158 F. 2d 754 (9th Cir. 1946); and Horse Creek Coal Land Co. v. Alderson, 266 F. 477 (4th Cir. 1920), which give res judicata effect to prior decrees involving the same property that is subsequently contested.

have been raised or litigated by the United States in the *Orr Ditch* proceeding. The uncontradicted evidence is that the government's *Orr Ditch* attorneys considered the fishery right to be outside the scope of *Orr Ditch*. The United States did not appear in *Orr Ditch* in its capacity as trustee of the Tribe's fishery water right and that claim should not be merged with inconsistent claims asserted in different capacities. The *Orr Ditch* defendants knew or should have known about the government's conflicting obligations to the Pyramid Lake Indians and the Newlands Project water users and the different capacities in which the United States appeared in *Orr Ditch* on behalf of those two interests. And procedures were available to the *Orr Ditch* defendants by which they could have compelled the United States to identify or assert all of its possible claims to the use of Truckee River waters in Nevada. The combined effect of these factors, all of which are specifically connected with the fishery water rights claim, is more than sufficient to overcome the general intent of the parties to make the *Orr Ditch* litigation as comprehensive as possible.

There were good reasons for not litigating the fishery water right in *Orr Ditch*. The Pyramid Lake Tribe and its fishery were innocent victims of the government's conflicting responsibilities and capacities. They have suffered enough by not having the fishery water right adjudicated 60 years ago. They sould not be penalized even more by a holding that the United States was required to represent directly conflicting interests. *See* PA 242a-243a.

II.

Barring The Tribe From Asserting Its Claimed Fishery Water Right Results In a Denial Of Procedural Due Process.

Res judicata cannot be applied to defeat the Tribe's claim to a fishery water right unless *Orr Ditch* provided a full and fair opportunity to litigate that claim. *Kremer v. Chemical Construction Co.*, 102 S. Ct. 1883, 1897 and n. (1982) (majority opinion). *See also*, 102 S. Ct. at 1905 n. 11 (dissenting opinion). The constitutional right to a full and fair opportunity to be heard, derived from the Due Process clauses of the Fifth and Fourteenth Amendments, includes two critical components, "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action," *Mulane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and "an opportunity to be heard . . . at a meaningful time and in a meaningful manner," *Barry v. Barchi*, 443 U.S. 55, 66 (1979). *See Landon v. Plasencia*, — U.S. —, 51 USLW 4001 (No. 81-129, November 15, 1982) (Government must provide opportunity for presentation of effective case with procedures designed to minimize risks of erroneous deprivation of protected interests). Assuming *arguendo* that the Tribe's claim to a fishery water right is part of the government's *Orr Ditch* cause of action, the Tribe was not provided with either notice or a meaningful opportunity to be heard and therefore cannot be precluded from litigating that claim by operation of res judicata.

The record is clear that the Tribe was not provided any notice that its fishery water right was at issue in *Orr Ditch*. 24 Tr. 4483; 25 Tr. 4704-05, 4710-11, reproduced in App. to Tribe's Cross-Petition at 1a-2a. *See Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974); *Schroe-*

der v. City of New York, 371 U.S. 208, 214 (1962). Indeed, tribal members were assured by the Commissioner of Reclamation that his Bureau would "carefully guard against taking any action that would impair the right of the Indians" to water for fishing. PA 206a. Even if the United States can be said to have had notice that the Tribe's fishery water right was necessarily part of the *Orr Ditch* cause of action, the Tribe's right to procedural due process is not satisfied by providing notice to a nominal "trustee" who "represents" conflicting interests. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940).

It is equally clear that representation by a "faithless fiduciary" burdened by conflicts of interest which preclude fulfillment of the duty of undivided loyalty to its beneficiary's interests, *see* PA 239a, 242a, does not provide a "meaningful" or a "full and fair" opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also, Wood v. Georgia*, 450 U.S. 261 (1981); *Holloway v. Arkansas*, 434 U.S. 475, 481 (1978); *Morrisey v. Brewer*, 408 U.S. 471, 485-86 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 269, 271 (1970); *New Jersey v. New York*, 345 U.S. 369 373-74 (1953); *Von Moltke v. Gillies*, 332 U.S. 708, 825-26 (1948) (plurality opinion); *Glasser v. United States*, 315 U.S. 60, 70, 75-76 (1942) cases cited *supra* at 27.[22] Where, as here, the denial of a full and fair

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[22]The criminal cases involving attorneys' conflicts of interest arise under the right to assistance of counsel guaranteed by the Sixth Amendment. But there is obviously a close relation-

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opportunity to be heard is attributable to the acts of state or federal officials, the Due Process clauses of the Fifth and Fourteenth Amendments preclude deprivations of protected property interests. *Lugar v. Edmundson Oil Co.*, 102 S. Ct. 2744 (1982); *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148 (1982).

Moreover, the government's conflict was not simply abstract or theoretical. The district court specifically found that the fishery water right of the Pyramid Lake Tribe was knowingly sacrificed by the government to the "larger" interests of the Newlands Project. PA 215a-216a, 165a-167a, 185a, 189a.[23] Thus, the Tribe has satisfied the most stringent due process standards by demonstrating that the government actually had a disabling conflict of interest and that its conflict adversely affected the performance of the lawyers who were purportedly representing the Tribe's interests. *See Cuyler v. Sullivan*, 446 U. S. 335, 348-50 (1980); compare 446 U. S. at 350-358 (concurring and dissenting opinions).

The Tribe's procedural due process rights were also denied in another respect. An employee of the Bureau of

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ship betwen the Sixth Amendment right to counsel and the right to due process under the Fifth and Fourteenth Amendments. *See* Wood v. Georgia, *supra*, 450 U. S. at 271-72; Glasser v. United States, *supra*, 315 U. S. at 70; Hansberry v. Lee, *supra*, 311 U. S. at 40, 42. If a conflict deprives a criminal defendant of the right to effective assistance of counsel, it must also result in the denial of a meaningful, or a full and fair, opportunity to be heard.

[23]The district court's additional finding that the government's lawyers were not chargeable with an "impermissible" conflict, PA 189a-190a, was predicated on its holding that the Reclamation Act authorized the taking of Indian reserved water rights for the benefit of reclamation projects and that the government's lawyers were simply implementing this congressional directive. PA 215a-216a, 161a-167a. That legal conclusion was reversed by the court of appeals, PA 215a-219a, and is not challenged in either petition for certiorari.

Indian Affairs advised the *Orr Ditch* trial judge of the conflict between the water needs of the Pyramid Lake fishery and the Newlands Project. Ex. A-408, reproduced in App. to Tribe's Cross-Pet. at 4a-5a.[24] Having this information, the trial court was obligated to inquire into the adequacy of the government's representation of these two conflicting interests in order to insure compliance with minimal procedural due process requirements. Its failure to do so constitutes a denial of due process. *Wood v. Georgia*, 450 U.S. 261, 272 (1981); *Cuyler v. Sullivan*, 446 U. S. 335, 347 (1980). *See also, United States v. Johnson*, 319 U. S. 302 (1943).

The due process issue in this case is controlled by *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148 (1982). In that recent case decided after the court of appeals issued its opinions, a physically handicapped employee filed a complaint with a state agency charging that his employment had been terminated unlawfully. The agency had inadvertently failed to convene a fact-finding conference within the statutorily prescribed period. The State Supreme Court held that the agency's failure to comply with the statutory deadline resulted in the extinguishment of the employee's cause of action.

This Court reversed, holding that the employee's cause of action is a property interest entitled to due process protection and that the employee's cause of action could not be extinguished by a governmental agency unless he was provided an opportunity to present his claim

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[24]The trial judge who approved the *Orr Ditch* final decree in 1944 had previously represented *Orr Ditch* defendants and "had argued strenuously against the claims of the government for an 1859 right for the lands of the Pyramid Lake Reservation." Ex. U-214 at 3; *see also* JA 479. The attorney for the United States at that time had previously served as counsel to TCID, the Tribe's major competitor. JA 478-80, 485.

at a meaningful time and in a meaningful manner. Since the employee was denied that opportunity as a result of the state agency's failure to act within the statutorily prescribed period, the State statute as interpreted and applied by the State Supreme Court was held to constitute a denial of procedural due process. 102 S. Ct. at 1153-59.

This case is indistinguishable from *Logan* in all pertinent respects. The Tribe's cause of action for a fishery water right was not asserted or litigated by the government in the *Orr Ditch* proceedings owing to the government's conflict of interest. PA 239a, 242a, 161a-167a, 185a, 187a, 189a-190a. *Logan* holds that a third party's cause of action cannot be extinguished as a result of the government's failure to fulfill its obligations, 102 S. Ct. at 1156-57, and that a post-deprivation remedy which cannot make a claimant "entirely whole" is constitutionally inadequate, 102 S. Ct. at 1158.[25]

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[25]The court of appeals rejected the Tribe's due process challenge on the grounds that the district court found that the *Orr Ditch* defendants lacked actual knowledge of the government's conflict. PA 229a, 236a-238a, 258a. But *see supra* at 36 and n. 20. This was clear error. The Tribe's rights do not depend on what its potential adversaries knew or did not know. Section 42 (e) of the *Restatement (Second), supra*, on which the court of appeals relied, does not purport to define or implement the procedural due process guarantees of the Fifth or Fourteenth Amendments. Rather, it governs relationships between private representatives and their beneficiaries which are not restrained or limited by due process requirements. *See* Lugar v. Edmundson Oil Co., 102 S. Ct. 2744, 2754 (1982); Flagg Brothers, Inc. v. Brooks, 436 U. S. 149, 156-57 (1978). Determining the adequacy of representation of nonparties' interests by public agencies or officials is governed by Section 42 (d) of the *Restatement (Second)*, not Section 42 (e). *See Restatement (Second)*, § 42, comment f, only partially quoted by the court of appeals at PA 237a; Hansberry v. Lee, 311 U. S. 32 (1940); *Restatement (Second), supra*, § 36, Reporter's Note at 365-66.

The only conceivable distinction between this case and *Logan* is that the State agency's failure to convene the fact-finding conference within the statutory period was "[a]pparently inadverten[t]," 102 S. Ct. at 1152, whereas here the federal officials, made a definite decision not to assert and litigate the Tribe's cause of action in the *Orr Ditch* case. PA 198a, 204a-208a, 211a-213a. But for due process purposes, it does not matter whether the extinguishment of a cause of action is said to have occurred through governmental negligence, inadvertence, mistake, or deliberate and willful misconduct. The only relevant inquiry is whether "the aggrieved party [was granted] the opportunity to present his case and have its merits fairly judged." 102 S. Ct. at 1156.

III.

Non-Orr Ditch Parties Cannot Take Advantage of Res Judicata

The court of appeals obviously erred in upholding the res judicata defense of subsequent appropriators of Truckee River water who are neither *Orr Ditch* parties nor successors in interest to Orr *Ditch* parties. PA 239a-240a. The *Orr Ditch* cause of action and the cause of action asserted in this case against subsequent appropriators are different "by definition," so their only available preclusion defense is collateral estoppel. *Montana v. United States*, 440 U. S. 147, 154 (1979). Since the fishery water right was not actually litigated in *Orr Ditch*, collateral estoppel does not apply. *See supra* at 19, 20-21. Therefore, the Tribe cannot be barred from asserting its claim against any non-*Orr Ditch* parties.

CONCLUSION

The Pyramid Lake Paiute Tribe is entitled to its day in court. The judgment of the court of appeals should be reversed insofar as it upholds the res judicata defense of the *Orr Ditch* parties, their successors in interest, and subsequent appropriators of Truckee River water.

Respectfully submitted,

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APPENDIX

All exhibits offered into evidence in this case are listed in Volume I of the Reporters' Transcript of Proceedings at 19-150 along with references to the pages of the transcript at which each exhibit was marked, offered, admitted and/or rejected. The exhibits are not reproduced in the 26 volume Record on Appeal.

To conform to the requirements of Sup. Ct. Rule 34.5, the following table is a list of all the exhibits to which reference is made and the page numbers of the transcript at which they were offered in evidence and ruled on by the trial judge.

	Transcript References	
Exhibit Nos.	Offered	Admitted
A-408	4501	4583
B-492	376	379
U-22	1042	1059
U-163 (same as A-50239B)	300	308
U-182	1046	1059
U-214	1046	1059
U-242	1047	1059
U-488	4524	4526
U-489	4530	4531
U-490	8978	8979
U-491	8978	8979
U-580	2154	2157, 2264
U-621	2494	2509
U-413	1072	1072